REMARKS/ARGUMENTS

Claims 1-16 are pending.

Claim 1 (a method claim) and claim 7 (an apparatus claim) are independent claims.

Foreign Priority

The acknowledgment of claim for priority is noted.

The Examiner requested a certified copy of the Israel 132708 application as required by 35 U.S.C. §119(b). Clarification of this is requested. As set forth in PCT rule 17.2(a) the foreign priority document was filed with the PCT application and thus is not required to be submitted by the Applicant in the present application. **This is a second request, and the Examiner is requested to clarify his position.**

Drawings

A new set of drawings is attached which provide the corrections approved by the Examiner in the previous Office Action.

Reply to Objections

In Section 2 of the final Office Action, claims were objected to. The claims have been amended.

The Examiner is requested to withdraw the objections to the claims in view of the amendments made.

Also, the specification was objected to. Amendments have been made to the specification.

The Examiner is requested to approve these changes and withdraw the objections.

Reply to Rejections

First Rejection

Claims 1-6, 11, 14 and 15 were rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which Applicant regards as the invention.

The Examiner's detailed review of the claims is appreciated. The claims have been amended and do comply with 35 U.S.C. § 112.

For the reasons set forth above, the Examiner is requested to reconsider and withdraw the rejection of the claims under 35 U.S.C. § 112, second paragraph.

Second Rejection

Claims 1, 3 and 5 were rejected under 35 U.S.C. § 102(b) as being anticipated by EP '372 (EP 0214372). This rejection is

traversed. The reference cited is to Buchner et al. and is identified below.

The invention described in Buchner et al. concerns an apparatus for the gas flushing and sealing a packaging container 1 having a lid 2 configured as a flange provided with U-shaped margin. The flange is sealable on the upper edge of the container by deformation its margin. The apparatus is provided with a central sealing stamp 10, which can reciprocate up and down and with plurality of clamping jaws 12, which are horizontally displaceable so as to be pressed against the U-shaped margin and to bend it. The apparatus is provided also with a ring 15, in which are made channels for supplying a gas to the central part of the ring.

The apparatus operates as follows. In the first position, the lid is loosely placed on the upper extremity of the container, as shown in Fig. 3. The stamp, the jaws and the ring are above the container. In the next position, which is shown in Fig. 4, the stamp, the ring and the jaws is seen after it has lifted off. The lid has been also forcibly displaced up by the ring, which supports the margin. In this position, a protective gas is conveyed through the channels into the central space of the ring. The gas flushes out through a gap 14 between the lower part of the ring and the outwardly facing surface of the

container. In the next position, which is shown in Fig. 5, the clamping jaws are displaced in horizontal direction and bend the margin to seal the lid over the container. The last position is shown in Fig. 6, and it is seen that the stamp, ring and clamping jaw are displaced above the container, while the lid is now tightly attached to the container.

Thus, the method of gas flushing described in Buchner et al. employs a lid with U-shaped margin and includes a step, in which the lid is forcibly lifted off to define confined space into which the protective gas enters. The other elements, which lift off simultaneously with the lid include stamp and clamping jaws. Attaching the lid to the container is carried out by horizontal displacement of claiming jaws, which laterally surround the U-shaped margin. In the present invention, the closure-forming membrane is flat, it is never placed on the container, the spacer member never lifts the membrane off and after the membrane has been tensioned between the container and the pressing plate, it remains in the same position. Attachment of the membrane of the container is carried out by virtue of vertical displacement of the pressing plate. The main claim has been amended so as to define the method of the present invention in more detail and to emphasize how it differs from Buchner et al.

As each and every limitation in the claim is not shown either specifically or inherently in Buchner et al., a rejection under 35 U.S.C. § 102(b) is not viable.

Even though the claims have been amended, there is no suggestion in Buchner et al., without benefit of the Applicant's own disclosure, to arrive at the method claims.

For the reasons set forth above, the Examiner is requested to reconsider and withdraw the rejection of the claims under 35 U.S.C. § 102.

Third Rejection

Claims 2 and 4 were rejected under 35 U.S.C. § 103(a) as being unpatentable over EP '372 (EP 0214372) (hereinafter "Buchner et al.") in view of Grune et al. (U. S. Patent 5,071,667). This rejection is traversed.

It is noted in the fourth paragraph of the rejection that the reference to Noel et al. was referred to. This appears to be a typing error in the Office Action. Clarification is requested.

The apparatus disclosed in the Buchner et al reference functions periodically, it employs multilayer lid, which has U-shaped margin and which consists of outer carrier layer, intermediate aluminum layer and inner thermoplastic layer. The

Buchner et al. apparatus employs a stamp, which is situated above the lid with possibility to reciprocate up and down and also a ring with channels for admitting protective gas around the whole periphery of the container. In the Buchner et al. apparatus, the confined space for admitting protective gas is arranged by virtue of vertical displacement of the lid with respect to the container. The container does not displace horizontally and the lid is sealed on the container, when it is situated in the same working station where the gas has been already admitted to the confined space.

Grune et al. describes a periodically functioning apparatus, which is provided with a plurality of working stations and plurality of containers, which travel horizontally from station to station. In Grune et al., a flat lid 44 is employed consisting of one layer. There is not reciprocating stamp and no ring with channels. The protective gas is admitted through a dedicated conduit 54, which is situated at one side of the container 3. There is no confined space. The container is displaceable horizontally and admittance of the gas and sealing the lid takes place when container is located in different working stations (station 33 and station 43).

Due to the above constructional differences, the alleged combination of Buchner et al with Grune et al. is not feasible,

not to mention that none of the references contains any suggestion, teaching or incentive, which would support desirability of such a combination.

Furthermore, the alleged combination of Buchner et al. with Grune et al is improper, since it would render the apparatus of Buchner et al. inoperable, because Buchner et al requires confined space, while in Grune et al., confined space is absent.

It appears that the Examiner has not considered the combination as a whole but has concentrated on the individual parts and not the combination. This is improper under 35 U.S.C. § 103. See *Hybertech Inc. v. Monoclonal Antibodies, Inc.*, 231 USPQ 81 (Fed. Cir. 1986) (also cited in the MPEP), wherein the Court stated as follows:

> Focusing on the obviousness of substitutions and differences instead of the invention as a whole … was a legally improper way to simplify the difficult determination of obviousness.

Additionally, the addition of the secondary reference to Grune et al. does not cure the innate deficiencies of a rejection based on Buchner et al.

For the reasons set forth above, the Examiner is requested to reconsider and withdraw the rejection of the claims under 35 U.S.C. § 103.

Fourth Rejection

Claim 6 was rejected under 35 U.S.C. § 103(a) based on Buchner et al. (EP 0214372) in view of Noel et al. (U. S. Patent 5,718,101). This rejection is traversed.

The Examiner rejects claim 6 by alleging that it would have been obvious to a person with ordinary skill in the art to modify the method of Buchner et al. by having provided a vacuum means in communication with the confined space as taught by Noel et al.

Since no teaching, motivation or suggestion can be found in the cited references which would support such a combination, it cannot be a basis for a *prima facie* obviousness rejection.

Furthermore, it has been already shown that the method and apparatus of Noel et al. is based on a dual-lid scheme, which would be absolutely unnecessary, totally irrelevant and even forbidden for such food products, which should retain their color and not to degrade in presence of oxygen. The apparatus of Buchner et al similarly to the present invention, is based on a one-lead scheme, which employs only a sole, gas impermeable film. By careful inspecting of the Buchner et al. reference, one can conclude that this invention seeks to prevent gas exchange with the ambient atmosphere and to prevent formation of microorganisms ("… *keine Keime aus der Umgebungsluft in die*

Behaelter gelangen koennen", see p. 3, last six lines). To satisfy this requirement, the apparatus of Buchner et al. should employ one lead scheme. Therefore, the alleged combination of one lead apparatus of Buchner et al. with the dual lid apparatus of Noel et al. cannot constitute a *prima facie* obviousness rejection, since such a combination would not provide reasonable expectation of success.

Additionally, as explained above, the Examiner is not considering the combination as a whole but is concentrating on the obviousness of substitutions.

Additionally, claim 6 depends on claim 1 and the citation of Noel et al. does not cure the innate deficiencies of a rejection based on Buchner et al.

For the reasons set forth above, the Examiner is requested to reconsider and withdraw the rejection of the claim under 35 U.S.C. § 103.

Fifth Rejection

Claims 7-16 were rejected under 35 U.S.C. § 103(a) as being unpatentable over WO '400 (WO 91/03400) (hereinafter "Garwood").

The Examiner alleges further in paragraphs 11-13 that claims 7-16 are unpatentable as being obvious over the Garwood reference (WO 91/03400). In particular, the Examiner alleges

that it would have been obvious to use gas-impermeable membrane, that apparatus of Garwood is capable of packaging product other than meat having less volume than the container (apparently the Examiner uses this allegation to support a possibility that there would be a confined space between the web and the container) and that apparatus of Garwood is capable of receiving gases for treating other products different than meat.

This is not supported by some teaching, suggestion or incentive explicitly mentioned or suggested in the Garwood reference.

The invention in accordance with the Garwood reference is intended to packaging perishable goods, such as red meat. The apparatus disclosed in Garwood contains a base 1, a lid 3, and a flexible web 5 made of a gas permeable material stretched and held over the goods 7 so the goods are held to the base 1. It is explicitly stated in the specification of Garwood that the height of goods 7 is above a lip 9 of the base and that the height of depression in the lid is such that there will be a space 15 between the lid and the flexible web. This arrangement allows supplying a suitable gas in the space 15 for enhancing the keeping properties of the goods. The gas can also be provided under the web in the remaining portions of the depression in the base 1.

It is important to emphasize, however, that it is imperative for the apparatus of Garwood that the web is capable to exhibit gas permeability properties so that the gas within the space 15 can permeate the flexible web and contact the surface of the goods 7. This permeability is also required in order to allow any gases, which may generate within the package between the base 1 and the flexible web 5 to permeate through the flexible web 5 into the space between the web and the lid 3. Garwood explicitly states that "*the web may comprise a sheet of plastic material with perforations or opening therein and/or it may comprise a mesh web of material or mere strands of material. In this instance, the gas, which is within the package can freely circulate through the flexible web 5 and contact the goods 7*" (pages 5 and 6).

Therefore, the Examiner's allegation that the apparatus of Garwood is capable of using gas-impermeable film is not supported by the specification. On the contrary, one can conclude that Garwood requires that the film is permeable. A possibility for a gas permeable material is mentioned on page 8, nevertheless this possibility is feasible only when the film does not cover a substantial portion of the goods 7. It can be appreciated that this condition is not relevant to the present invention, requiring covering entirely the container with goods.

As to the second allegation, i.e., that the apparatus of Garwood is capable of packaging product having less volume than the container, it should be pointed out that we failed to discover mentioning of this opportunity in the specification of Garwood. Garwood explicitly requires that "*the flexible film 5 is stretchingly engaged over the goods 7 and sealed to the base 1 so that the goods 7 are held relative to the base 1 by the flexible web 5 being stretched and sealed to the base 1 so the goods 7 cannot flop around within the packaging*" (page 7). Due to this requirement, the apparatus of Garwood would never have a confined space between the film and the container into which a protective gas is supplied, and therefore, there is no ground for the second allegation.

As to the third allegation, which refers to a possibility for receiving other gases for treating other than meat products, one should keep in mind that Garwood does not disclose such a possibility, but only mentions that the gas supplied below the film may differ from the gas supplied above the film. Nevertheless, even in this situation, the film should be permeable and one of the gases should be oxygenating gas, "*which for read meats will enhance the color keeping properties over a period of time*" (see page 15). In other words, one can conclude

that Garwood's invention seeks solely to enhance the keeping qualities of such packaged goods as red meat.

The present invention is not intended for rendering red color to meat by virtue of exposure to high oxygen gas, the present invention employs a gas-impermeable film; the film is not stretched over the foodstuff, the foodstuff is exposed solely to low-oxygen replacement gas, which is supplied to a confined space arranged between the foodstuff and the film.

The Examiner's rejection is not supported by any viable evidence and is truly speculation on the part of the Examiner which does not provide evidence to base a rejection on Garwood under 35 U.S.C. § 103. Speculation is not evidence.

For the reasons set forth above, the Examiner is requested to reconsider and withdraw the rejection of claims 7-16 under 35 U.S.C. § 103.

Conclusion

Should there be any outstanding matters that need to be resolved in the present application, the Examiner is respectfully requested to contact Elliot A. Goldberg (Reg. No. 33,347), at the telephone number of (703) 205-8000, to conduct an interview in an effort to expedite prosecution in connection with the present application.

If necessary, the Commissioner is hereby authorized in this, concurrent, and future replies to charge payment or credit any overpayment to Deposit Account No. 02-2448 for any additional fees required under 37 C.F.R. §§ 1.16 or 1.17; particularly, extension of time fees.

Respectfully submitted,

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Attachments: Replacement Sheets of Drawings